

THE GST COUNCIL- A TRANSFORMATIVE INSTITUTION IN CRISIS

written by Lukmaan IAS

THE CONTEXT: The Goods and Services Tax Council is the backbone of the GST system. Of late, this sui generis federal institution has been facing several challenges impacting its working and output. The several States have voiced concerns about the lack of proper deliberations, the high handedness of the Centre, excessive delegation to bureaucracy etc. Added to this, there are questions being raised on the Constitutional status of the decisions of the GST Council. Against this backdrop, this writes up comprehensively examines the various issues the GST Council is facing and also analyses the probable solutions for improving its working.

BACK TO BASICS: UNDERSTANDING THE GST COUNCIL

ABOUT GST COUNCIL	<ul style="list-style-type: none">· The Constitution (One Hundred and First Amendment) Act, 2016 inserted Art 279A into the constitution which heralded a new regime of cooperative fiscal federalism by establishing the GST Council.· The GST Council is a joint forum of the Centre and the States which will make recommendations to the Union and the States on important issues related to GST.
--------------------------	--

<p>COMPOSITION</p>	<ul style="list-style-type: none"> • Union Finance Minister – Chairperson. the Union Minister of State, in-charge of Revenue of finance – Member. the Minister In-charge of finance or taxation or any other Minister nominated by each State Government – Members. • The GST Council Secretariat, New Delhi shall be manned by officers taken on deputation from both the Central and State Governments.
<p>FUNCTIONS OF THE GST COUNCIL</p>	<ul style="list-style-type: none"> • Make recommendations to the Union and the States on issues related to GST such as: <ul style="list-style-type: none"> • ØThe goods and services that may be subjected to or exempted from GST, • Model GST Laws, principles that govern Place of Supply, threshold limits, • GST rates including the floor rates with bands, special rates for raising additional resources during natural calamities/disasters, • Special provisions for certain States, etc. • The GST Council will also recommend the date on which GST will be levied on petroleum crude, high-speed diesel, petrol, natural gas and aviation turbine fuel.

DECISION MAKING PROCEDURE	<ul style="list-style-type: none"> · The quorum of GST Council is 50% of total members · Decision is taken by 3/4th majority (75%), wherein the Central Government would have the weightage of 1/3rd of the total vote cast. · The State Governments would have a weightage of 2/3rd of the total votes cast. · The decisions are taken mostly on the basis of consensus but the Council voted on the issue of tax on the lottery in a meeting held in 2020.
--	--

THE GST COUNCIL AND THE MAKING OF INDIAN COOPERATIVE FEDERALISM

The adoption of GST and the creation of the GST Council itself was a major shift from the past in terms of cooperative and competitive federalism. The working of the GST Council also has been transformative in terms of its number of meetings (more than 43 times), review of GST rates and efforts to seek cooperation with states for the effective implementation of GST. In fact, the work of the GST Council was considered as more successful than that of the Inter-State Council and National Development Council. However, the Covid-19 pandemic and the emerging implementation challenges of GST have also posed challenges for the GST Council.

THE FACTORS AFFECTING THE FUNCTIONS OF THE GST COUNCIL

<p>COMPENSATION TO STATES</p>	<ul style="list-style-type: none"> · As per the GST (Compensation to States) Act 2017, the Central Government has to compensate the States for any revenue loss arising out of GST. · Despite this legal mandate, the Centre largely failed to compensate the States on time in 2019-20 and also during the pandemic period. · Although an agreement was reached later, the fraternal feeling that dominated the Council proceedings have suffered serious damages. · Also, the modalities of unpaid compensation worth 63000 crores have not been settled yet which is likely to create further tension and conflicts in Council meetings.
<p>LONG GAP BETWEEN MEETINGS</p>	<ul style="list-style-type: none"> · The Council is expected to meet every quarter but during the Covid 19 period, the meetings became irregular. For instance, the recent meeting on May 28, 2021, was held after a gap of seven months although the States have been requesting the Centre to schedule early meetings. · The gaps in holding the meetings and consequent delay in taking important decisions impact the entire GST system (Recall, debate on GST on life-saving medical drugs and devices during Covid second wave)

<p>MOUNTING CRITICISM FROM STATES.</p>	<ul style="list-style-type: none"> · Tamil Nadu Finance Minister has lamented that the GST system is “badly designed and executed and repudiated the practice of every State having equal vote despite the difference in size and population. · West Bengal’s Finance Minister has argued that the GST Council’s meetings have become “acrimonious, vexing, and almost toxic with the erosion of mutual trust that held fast between the State and the Centre since the inception of the GST Council”. · Kerala’s Finance Minister has claimed that the GST is “antithetical to federalism to begin with”.
<p>POLITICISATION OF MEETINGS</p>	<ul style="list-style-type: none"> · The deliberations in the Council meetings have seen the States and the Centre taking positions based on political party lines. The BJP and non-BJP groupings have started to impact the cordial and cooperative atmosphere in the meetings. · States even alleged that during virtual meetings, their microphones were switched off which prevented them from voicing their concerns.

<p>EXCESSIVE DELEGATION</p>	<ul style="list-style-type: none"> · The GST Implementation Committee comprised of civil servants implements the decisions of the Council and also takes routine and procedural decisions in the period between the Council meetings. · The States have pointed out that the GIC has been taking substantive decisions without taking approval from the Council. · Bureaucratic decisions—ranging from restricting input tax credits to cancellation of GST registration—set the dangerous precedent of delegating excessive powers to bureaucrats and States like Punjab has asserted that it will not incorporate such substantive legal changes in State legislation in future unless cleared by the Council.
<p>GST DISPUTE RESOLUTION MECHANISM</p>	<ul style="list-style-type: none"> · Art 279A (11) provides that The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute— <ul style="list-style-type: none"> (a) Between the Government of India and one or more States; or (b) Between the Government of India and any State or States on one side and one or more other States on the other side; or (c) Between two or more States, arising out of the recommendations of the Council or its implementation. · Despite four years of GST, the adjudicatory mechanism has not been established which means future disputes can disrupt the GST system itself.

UNRESOLVED CONSTITUTIONAL ISSUE	<ul style="list-style-type: none"> · Cooperative federalism implies a reasonable degree of autonomy to the participants. Each party can bargain about the terms of cooperation and, if driven too hard, decline to cooperate. · Voluntary participation is the core feature of cooperation in a federal polity which is at odds with the GST Council's "majority rules" decision-making process. As a result, there is a lack of certainty regarding the status of the GST Council's decisions (Read Ahead)
--	--

NATURE OF DECISIONS OF THE GST COUNCIL: RECIPE FOR CONFLICTS?

LACK OF CLARITY OF RECOMMENDATIONS	POSSIBLE REASON NUMBER 1	POSSIBLE REASON NUMBER 2	POSSIBLE REASON NUMBER 3
---	-------------------------------------	---	-------------------------------------

<p>· The GST Council is mandated to make “recommendations” on all matters to GST to the States and centres.</p> <p>· But nowhere in the Constitution is it mentioned whether the recommendations are binding on the Centre or the States.</p> <p>· If one or more States decide to opt-out of GST or refuse to follow the recommendations, it will lead to a constitutional crisis.</p>	<p>· Treating the Council’s decisions as binding would be unconstitutional as it would be violating the legislative supremacy of both the Parliament and the State Legislatures.</p> <p>· Art 246A provides for concurrent taxation power to the Parliament and State legislatures relating to goods and services under GST.</p> <p>—</p>	<p>· The Supreme Court of India has long held that federalism is part of the Basic Structure of the Constitution.</p> <p>· Application of Basic Structure Test to any such amendment that violates the fiscal autonomy of the States may not stand the scrutiny of the courts under the Basic Structure doctrine.</p>	<p>· There may be a lack of political will to make the GST Council’s decisions mandatory which would impact the Constitutional right (however limited) of States to determine their own indirect tax policy</p> <p>· The States may have adopted a wait-and-watch approach. If the GST system is successful and their revenue targets are met, well and good. Instead, they may opt-out and revert to the old system.</p>
--	---	---	---

MAKING THE DECISION BINDING: PROBABLE SOLUTIONS AND THEIR IMPLICATIONS

SERIAL NO:	SOLUTIONS	IMPLICATIONS
------------	-----------	--------------

<p>1</p>	<p>· A Constitutional Amendment clarifying that the “recommendations” of the GST Council are binding on the Centre and the States.</p>	<p>· This would end the ambiguity once and for all but would be tough to achieve for lack of political will.</p> <p>· States may not agree as the Amendment would make it obligatory for them to accept the decision of a majority, even in situations where they register their dissent. As recent events show, the States are yet to fully trust the GST system.</p>
----------	--	--

<p>2</p>	<ul style="list-style-type: none"> · Seeking court intervention to interpret the existing GST-related legislative provisions. The wording of certain provisions suggests that the GST Council's decisions, despite being termed "recommendations," are indeed binding. · For instance, the language of section 9(1) of the CGST Act 2017 suggests that the Centre can impose tax only at rates that are recommended by the GST Council. The language of the States' GST statutes is almost identical to the Central Law. 	<ul style="list-style-type: none"> · A clarification from the Supreme Court on the real meaning and effect of the GST Council's "recommendations" would provide clarity. · Under the doctrine of purposive interpretation, a court is supposed to attach to a provision the meaning that serves the "purpose" behind it. · This may or may not pass the Supreme Court of India's "Basic Structure Test," on the ground that federalism may be affected by undermining the legislative authority of States
----------	--	--

<p style="text-align: center;">3</p>	<ul style="list-style-type: none"> · To create a dispute resolution mechanism for the GST Council that is similar to the existing Inter-State Water Disputes tribunals (ISWT) · The ISWT are the only quasi-judicial bodies in India that have original jurisdiction to decide inter-State disputes, which would otherwise fall within the exclusive domain of the Supreme Court of India. 	<ul style="list-style-type: none"> · As mentioned above, Article 279(A) (11) requires the GST Council to establish a mechanism to adjudicate Centre-State and inter-State disputes. · Making the decisions of such a dispute resolution mechanism final and binding could be an indirect way of making the GST Council's decisions binding. · This solution might pass judicial scrutiny, unlike the other two, primarily because of the water disputes tribunals' precedent.
--------------------------------------	--	--

4	<ul style="list-style-type: none"> Improve the existing system by promoting voluntary compliance by States through incentivisation. For instance, the GST Council is empowered to recommend a special rate for a specified period to raise additional resources during any natural calamity or disaster. 	<ul style="list-style-type: none"> The Council exercised this power in January 2019, when it approved the State of Kerala's proposal to levy a 1 per cent cess, following a devastating flood in August 2018. This has generated goodwill among the constituents of the federal polity. The GST Council has many such tools to address the economic exigencies of the federal units and its use in an apolitical manner can enable smooth functioning of the GST Council.
---	--	---

REFORMING THE GST COUNCIL: THE WAY AHEAD

<p>NOTION OF BINDING RECOMMENDATIONS</p>	<ul style="list-style-type: none"> As outlined above, bringing clarity in respect of the "recommendations" must be the immediate priority of the Council. Among, the possible solutions listed above, the Fourth One seems to be more apt. Fiscal autonomy is the essence of all federations; federal units may simply walk away in the absence of a binding mechanism. In Canada, for instance, British Columbia pulled out of Canada's harmonised sales tax (HST) system barely three years after agreeing to participate.
---	--

<p>DE POLITICISING THE COUNCIL</p>	<ul style="list-style-type: none"> · Both the Centre and States should adopt a more conciliatory attitude in deliberating critical issues in the Council and outside. · The Centre being the more mature and powerful partner need to show more accommodation to States concerns. For instance, its decision to directly borrow from the market (although belatedly) and channelize the funds to the States in lieu of GST revenue shortfall is well appreciated by States. · The dichotomy based on political party grouping must be ended and rather an issue-based position must be taken by all partners.
<p>ISSUE OF COMPENSATION TO STATES</p>	<ul style="list-style-type: none"> · The GST Compensation to States 2017 Act has many grey areas which have made the Council meetings a political slugfest. For instance, the compensation period is only for five years. · But as Covid 19 shows, the revenue shortfall is likely to last longer and such other exigencies might occur in future also. · So necessary consensus should be reached on the extension of the compensation period, the manner of funding it, and also what the phrase “on account of GST” means in the Act.

<p>MODALITIES OF CALLING COUNCIL MEETINGS.</p>	<ul style="list-style-type: none"> · As it stands, the Centre has the monopoly in calling or deciding the meetings of the Council by virtue of it being headed by the Union Finance Minister. This has resulted in an element of arbitrariness in the working of the Council. · The States should have critical say in calling the meetings and also in deciding its agenda. For instance, if one-fourth of States demand Council meetings, then the Centre should schedule it urgently. Giving more voice to the States in the working of Council will allay their fears of losing out on the fiscal front thereby the working of the Council will become more productive.
<p>LIMITING BUREAUCRATIC LEGISLATION</p>	<ul style="list-style-type: none"> · The GST Implementation Committee's mandate must be clearly earmarked especially the items/areas where the Committee can make rules/regulations. Where substantive issues are involved, say changing the procedure of compliance, withholding input tax credit etc require approval from GST Council. · GST Council is the microcosm of the State Legislatures and the Parliament and thus delegated legislation must not be pursued to an extent of bypassing these peoples' representative institutions. · Further, every critical decision of the Council must be placed before the State Legislatures and their approval must be taken and/or the state GST Law be amended wherever needed.

<p>ESTABLISHMENT OF DISPUTE SETTLEMENT MECHANISM.</p>	<p>· Along with the adjudicatory mechanism provided under Art 279A (11), the GST Appellate Tribunal under CGST Act must be set up on priority. While the former will provide a platform for effective grievance redressal for federal units, the latter will cater to the taxpayer segment (Recently a PIL has been filed in the Supreme Court to direct the Centre to constitute the tribunals both at national and regional under CGST Act).</p> <p>· Setting up these bodies will open up new chapters in the working of GST system and make the Council function with renewed purpose.</p>
--	--

THE CONCLUSION: The GST Council has been a pioneering experiment in the arena of fiscal federalism in India. Although fiscal sovereignty and autonomy are the key features of a federal political system, the States and centres have surrendered their taxation power for the collective good. Despite such noble intentions and objectives, the GST Council suffers from multiple issues, perhaps the biggest among them is the “nature of recommendations of the council”. Along with providing clarity on this issue, the increasing politicisation of the proceedings of the Council must be addressed. In order to make India Atmanirbhar, the GST Council must work in the spirit of “cooperative and collaborative federalism” than in “competitive and disruptive federalism”.